87-1919

No._____

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

YUKON ENERGY CORPORATION,

Petitioner,

vs.

WILLIAM F. HAGERMAN,

Respondent.

Petition for a Writ of Certiorari to the United States Supreme Court From the Eighth Circuit Court of Appeals

---

APPENDIX

BRIGGS AND MORGAN
Samuel L. Hanson
2400 IDS Center
Minneapolis, Minnesota 55402
(612) 339-0661
Attorneys for Petitioner

1988—Executeam Companies, Inc., 93 W. Little Canada Rd., St. Paul, MN 55117-(612) 483-8793/1-800-747-8793

30 pp

TABLE OF CONTENTS

Page

Eighth Circuit Court of Appeals Decision A-1

Order of the United States District Court B-1

Rule 56 of the Federal Rules of Civil Procedure C-1

Agreement Between Yukon and Hagerman D-1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

87-5092

William F. Hagerman, *Appellee,*	*	
v.	*	Appeal from the United States District Court for the District of Minnesota
Yukon Energy Corporation, *Appellant,*	*	
and David C. Tjosvold.	*	

Submitted: September, 3, 1987
Filed: February 9, 1988

Before HEANEY, Circuit Judge, ROSS, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ROSS, Senior Circuit Judge.

Appellee William F. Hagerman brought this action against David C. Tjosvold and appellant Yukon Energy Corporation for breach of contract, alleging that defendants failed to honor a stock option agreement between the parties. The district court[1] entered summary judgment on behalf of Hagerman and awarded him $290,317 in damages. Yukon appeals.[2]

For the reasons set forth below, we affirm the judgment of the district court.

[1]The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

[2]The district court also granted David C. Tjosvold's motion for summary judgment and dismissed him as a party. Tjosvold's dismissal is not at issue in this appeal.

Background

Yukon manufactures furnaces for residential and commercial use. In 1983, Yukon purchased for $100,000 certain technology regarding the development of fuel efficient furnaces. Yukon and Hagerman subsequently negotiated an agreement for the funding of the technology. Pursuant to the agreement, which was drafted by Yukon's attorney, Hagerman purchased the technology from Yukon for $150,000. Hagerman then licensed the technology back to Yukon in exchange for royalties, subject to a minimum and maximum annual payment. Under the agreement, Yukon was given the option to repurchase the technology from Hagerman within ten years for $175,000. Additionally, in the event of a public offering of Yukon stock within ten years of the agreement, Hagerman was given the option to purchase at book value shares of Yukon stock in an amount equal to 5% of the shares owned by Yukon's president, David Tjosvold.

In October, 1984, Yukon exercised its option to repurchase the technology from Hagerman. On October 23, 1984, Tjosvold delivered to Hagerman a check for $175,000, the repurchase price, and a check for $18,000 for one year's royalties. On that same day, Hagerman gave Yukon notice of his intent to exercise his stock option in the event of a public offering of Yukon stock.

In November, 1984, Yukon filed registration statements for a public offering of common stock with the Securities and Exchange Commission and the Minnesota Department of Commerce. Although the public offering was made in early 1985, Yukon never transferred shares to Hagerman. Hagerman brought this action seeking damages or specific performance of the parties' 1983 agreement.

A hearing was held on Hagerman's motion for summary judgment in April, 1986. Yukon opposed the motion by arguing that the parties had orally modified their agreement, eliminating Hagerman's stock option. Yukon further argued that in accordance with the modification, Yukon's tender of the two checks to Hagerman fulfilled all of Yukon's obligations under the agreement. After the summary judgment hearing, the district court ordered the parties to submit supplemental briefs on the issue of damages. The district court subsequently entered judgment for Hagerman.

As to Yukon's liability for breach of the stock option, the district court found that Yukon raised no genuine issue of

material fact as to whether the parties orally modified the technology agreement. The district court found that Yukon's actions subsequent to the alleged modification indicated that the agreement was not actually modified. The district court determined Hagerman's damages by figuring the difference between the contract price of the stock, as the court determined was set forth in the technology agreement, and the fair market value as of the first day of the public offering, and awarded Hagerman $290,317.

Yukon filed a motion to alter or amend judgment, and a hearing was held. The district court denied the motion without an opinion. On appeal, Yukon argues that the district court erred in granting summary judgment because Yukon raised genuine fact issues as to whether it breached the stock option provision and as to the remedy to be awarded Hagerman.

Standard of Review

In reviewing a district court's grant of summary judgment, this court is to apply the same standard that the district court was to have applied. *Stark v. St. Cloud State Univ.*, 802 F.2d 1046, 1048 (8th Cir. 1986). The Supreme Court recently stated that:

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial .... [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted

Anderson v. Liberty Lobby, Inc., 106 S.Ct 2505, 2511 (1986) (citations omitted.)

In determining whether summary judgment should lie, the district court is to view the evidence in the light most favorable to the nonmoving party and give to that party the benefit of all inferences which reasonably may be drawn. *Agristor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987).

Breach of Contract

Yukon argues that it raised a genuine issue of material fact as to whether it breached the technology agreement, such that summary judgment should have been precluded. In particular, Yukon contends that the stock option was terminated by an accord and satisfaction when Hagerman accepted the two checks from Yukon in full satisfaction of Yukon's obligations under the technology agreement. As evidence of the accord and satisfaction, Yukon presented Tjosvold's deposition testimony in which he stated that Yukon repurchased the technology from Hagerman at Hagerman's insistence. When Tjosvold gave Hagerman the two checks, Tjosvold told him "I understand that this ends our agreement, here is your money like you wanted, like you requested before. I suppose that's it." Hagerman did not reply at the time, but negotiated the two checks. Yukon now argues that an accord and satisfaction was accomplished because Yukon made clear that the checks were in full settlement of all of Yukon's obligations, and Hagerman accepted the checks without contradiction. Consequently, Yukon asserts, the stock option was terminated.

Yukon accurately states the Minnesota law of accord and satisfaction:

> If there is an honest dispute between the parties, a tender with the explicit understanding of both parties that it is in full payment of all demands, and an acceptance by the creditor with the understanding that the tender is accepted in full payment results in accord and satisfaction. When a payment is made by check *"which is offered in full satisfaction of the debt,* retention and negotiation by the creditor, *with knowledge of all the facts,* constitutes an acceptance of the offer to settle the indebtedness * * *."

Acton Constr. Co., Inc. v. State, 363 N.W.2d 130, 133-34 (Minn. App. 1985) (quoting *Butch Levy Plumbing & Heating, Inc. v. Sallblad,* 267 Minn. 283, 290, 126 N.W.2d 380, 385 (1964) (emphasis in original) (citation omitted)).

The agreement constituting the accord and satisfaction need not be express, but may be "implied from circumstances which clearly and unequivocally indicate the intention of the parties." *Id.* at 133 (quoting *Roaderick v. Lull Eng'g Co., Inc.,* 296

Minn. 385, 389, 208 N.W.2d 761, 764 (1973)). In the absence of proof of an express agreement, the court is to consider the conduct of the parties. *Becker v. F & H Restaurant Group, Inc.*, 413 N.W.2d 202, 205 (Minn. App. 1987). "The supreme court has not held that an accord and satisfaction has been reached in any case where mutual agreement was lacking." *Acton, supra*, 363 N.W.2d at 133.

The district court determined, and we agree, that Yukon failed to raise a genuine issue of material fact as to whether the parties mutally agreed to terminate Hagerman's stock option.[3] In making its determination, the district court looked to the conduct of the parties and determined that, except for Yukon's breach, the parties' conduct indicated that there was not an oral modification of the contract or an accord and satisfaction. The district court found determinative certain statements made by Yukon in the prospectus and stock registration statements in which Yukon affirmed the validity of Hagerman's option.

The prospectus prepared by Yukon's attorneys and dated February 14, 1985, detailed the technology agreement between Yukon and Hagerman. The prospectus stated that Yukon had repurchased the technology and that Hagerman had informed Yukon of his intention to exercise his stock option. The prospectus continued: "Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at

[3]We further note that there is a question as to whether the doctrine of accord and satisfaction would apply in this case because in tendering the two checks to Hagerman, Yukon was doing no more than it was required to do under the technology agreement in order to exercise its option to repurchase the technology. "'The rule has always been clear that the mere retention by the creditor of money to which he is entitled absolutely will not amount to an accord and satisfaction although tendered or transmitted to him as payment in full of demand.'" *Acton Constr. Co., Inc. v. State*, 363 N.W.2d 130, 134, (Minn. App. 1985) (quoting *Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 463, 124 N.W.2d 328, 339 (1963)). In response to this, Yukon contends that it was exercising the option only because Hagerman demanded that it do so, rather than because it had an obligation to do so under the agreement. Because we find that Yukon failed to raise a genuine factual issue as to whether the parties agreed to terminate the stock option, we need not address this issue.

approximately $.23 per share upon receipt of payment therefor."[4] Hagerman's stock option is mentioned four other times in the prospectus. Nowhere in the prospectus is there any mention that Yukon disputed Hagerman's option or that Yukon had any defenses to the exercise of the option. The prospectus was incorporated into the registration statements filed with the Securities and Exchange Commission and the Minnesota Department of Commerce. Additionally, the parties' technology agreement was listed as an exhibit to the registration statement, again without qualification and without repudiation of the validity of Hagerman's stock option.

In order to explain the statements regarding Hagerman's option, Yukon offered the affidavit of one of the attorneys who prepared the prospectus. The attorney stated that shortly before February 15, 1985 (the date of the final prospectus), Tjosvold told the attorney that he disputed the validity of Hagerman's option because of certain conversations between Hagerman and Tjosvold. However, the prospectus was written as if no dispute existed because those preparing it thought that it would be "safest" to take a "worst case" position.

Yukon objects to the district court's determination that Yukon was "estopped from denying the truth of its own statements" in the prospectus and to the district court's statement that the prospectus statements "must be taken as true." In making such determinations, the district court noted that both the Securities Act of 1933, *see* 15 U.S.C. §§ 77k, 771 and 77x (1982), and the Minnesota Uniform Securities Act, *see* Minn. Stat. Ann. §§ 80A.17 and 80A.22-23 (West 1986 & Supp. 1988), provide substantial penalties for the making of false statements

[4]The prospectus provided in part:

> The Company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual in exchange for $150,000. In conjunction with such assignment, the Company received an irrevocable, exclusive 10-year license for use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to such individual an option to purchase a number of shares equal to 5% of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the Company at the time of exercise. In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the Company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefor.

in a prospectus which accompanies a registration statement. We agree with Yukon that the statements in the prospectus and registration statements are not conclusive admissions. *See Enquip, Inc. v. Smith-McDonald Corp.*, 655 F.2d 115, 118 (7th Cir. 1981) (pleadings from another case are admissible as admissions, although they are not conclusive); *Brown & Root, Inc. v. American Home Assurance Co.*, 353 F.2d 113, 116 (5th Cir. 1965) *cert. denied*, 384 U.S. 943 (1966) (holding that "except for those specialized, rare assertions characterized as judicial admissions, a party is entitled to explain an admission and even to retract it.") However, the statements may be considered as evidence of whether there was in fact an oral modification of the parties' agreement or an accord and satisfaction.

Even considering the statements in Yukon's prospectus to be evidentiary rather than conclusive admissions, we agree with the district court that Yukon failed to establish the existence of a genuine factual issue as to whether the parties mutually agreed to terminate Hagerman's option. As noted previously, in the absence of an express agreement, a court is to look to the conduct of the parties. In this case, the evidence of the parties' conduct following the alleged accord and satisfaction consisted of Hagerman's attempt to exercise the option and Yukon's preparation of the stock prospectus in which it unequivocally affirmed the validity of Hagerman's stock option. Such conduct belies Tjosvold's assertion of a mutual agreement. Yukon presents no other evidence of conduct on its own part or by Hagerman which indicates that the parties reached a mutual agreement to terminate the written stock option. For example, Yukon presents no evidence that when Hagerman gave written notice of his intent to exercise the stock option, Yukon gave written response that it no longer considered the option to be in effect. We find that Yukon failed to create a genuine issue of material fact as to whether there was an oral modification or an accord and satisfaction. Therefore, summary judgment was appropriate.

Yukon next argues that it raised a fact question as to whether Hagerman was estopped from enforcing the stock provision by his own failure to perform an oral agreement between the parties. According to Yukon, at the time the technology agreement was entered, the parties also orally agreed that if Yukon ever had a public offering of stock of $5,000,000, Hagerman would fund it up to $2,000,000. Because Hagerman did not fund

Yukon's actual stock offering, Yukon contends that he is estopped by his own breach from enforcing the stock option.

In support of its argument, Yukon presented Tjosvold's deposition testimony that Hagerman and he had the following conversation:

> *[Hagerman] said say you have a $5,000,000 stock underwriting, how about if I put up two million of the $5,000,000 for the underwriting. I said, well, :hat sounds pretty good. He said, "Well, that's what I can do. If you need up to $2,000,000 to make sure it gets done, I have got it."*

Again, because there is no express evidence of this agreement, we look to the conduct of the parties. Yukon presented no evidence that Yukon ever approached Hagerman about funding part of Yukon's actual public offering. Additionally, as noted, the prospectus for Yukon's stock unequivocally affirmed the validity of Hagerman's option, without mentioning that Yukon disputed the option for any reason. Yukon failed to raise a genuine issue of material fact as to the question of estoppel, and therefore we affirm the order of the district court as to Yukon's breach for failing to honor Hagerman's stock option.

Remedy

As correctly stated by the district court, the appropriate measure of recovery to compensate Hagerman for Yukon's breach would be to place Hagerman in the same position he would have occupied absent the breach. *See Desnick v. Mast,* 311 Minn. 356, 364, 249 N.W.2d 878,883 (1976). The district court determined that this remedy should be damages, measured by the difference between the contract price of the stock which Hagerman should have received and its fair market value.

In figuring Hagerman's damages, the district court found the contract price to be set out in the technology agreement, which gave Hagerman the "option to purchase shares of Yukon equal to 5% of the share [sic] owned by David C. Tjosvold, President, at book value as determined by the accounting firm of Peat, Marwick & Mitchell." In the prospectus, Yukon stated that 5%

of Tjosvold's shares equalled 164,021 shares, and that Peat, Marwick & Mitchell had determined the book value as of the date Hagerman exercised his option to be approximately $.23 per share. *See* note 4, *supra.* Therefore, the district court figured the contract price to be 164,021 shares multiplied by $.23 per share, for a sum of $37,725.

In figuring the fair market value of the stock, the district court determined that the breach occurred on the first day Yukon stock was offered to the public, March 28, 1985. On that day, the market price for Yukon stock was $2.00 per share. Therefore, the fair market value of the 164,021 shares to be issued Hagerman was $328,042. Calculating the fair market value less the contract price, the district court determined Hagerman's damages to be $290,317.

Yukon contends that summary judgment was improperly granted with regard to Hagerman's remedy for two primary reasons. First, Yukon argues that specific performance rather than damages was the appropriate remedy in this case because Hagerman's monetary damages were too speculative. Second, Yukon contends that even if damages were the preferred remedy, the amount of Hagerman's damages should have been a jury question because of the many variables present in assessing the market value of the shares Hagerman was to have received. Central to both of these arguments is Yukon's contention that Hagerman was to have received unregistered rather than registered shares of Yukon stock. Yukon presented evidence that because of restrictions on transferability of unregistered shares, Hagerman's shares would have had a market value considerably less than the $2.00 per share awarded by the district court.[5]

In support of its argument that Hagerman's shares were to be unregistered, Yukon submitted the affidavit of John Ellingboe, one of the attorneys who helped prepare Yukon's stock prospectus. Ellingboe stated that in his opinion, Hagerman was to receive unregistered stock under the technology agreement. Yukon also submitted the affidavits of two securities experts who stated that the value of the shares Hagerman was to receive should be substantially discounted because they were unregistered.

However, a review of the record indicates that Yukon failed

[5]S.E.C. Rule 144 generally restricts the transferability of unregistered stock for a two year period. *See* 17 C.F.R. § 230.144 (1987).

to raise the issue of whether Hagerman's shares were to be registered until its motion to alter or amend judgment, made after the district court granted summary judgment for Hagerman.[6] Therefore, we consider whether the district court erred in granting Hagerman's motion for summary judgment based on the record before the district court at the time it ruled on the summary judgment motion.

At no time prior to the district court's grant of summary judgment did Yukon raise the issue that Hagerman's damages should be discounted because his shares were to be unregistered. In fact, at the summary judgment hearing, instead of arguing that Hagerman's shares were to be unregistered, Yukon's attorney informed the district court to the contrary:

> The Court: Were the shares under the agreement to have been lettered[7] in any regard?
> [Yukon's attorney]: No, Your Honor.
> The Court: So, they would have been freely disposable at that time?
> [Yukon's attorney]: Yes, Your Honor.

Subsequent to the summary judgment hearing, the parties filed supplemental memoranda regarding the issue of damages at the court's direction. Again, Yukon failed to contend that the shares were to be unregistered.[8]

The district court issued its order granting summary judgment for Yukon on October 22, 1986. On October 31, 1986, Yukon filed its notice of motion to alter or amend judgment, in which it contended for the first time that Hagerman's shares were to be unregistered. At this time Yukon also presented to the district court for the first time the Ellingboe affidavit and the two affidavits of the securities experts regarding the valuation of unregistered shares. The district court denied Yukon's motion to alter or amend judgment.

[6]We note that counsel for Yukon on this appeal did not represent Yukon in the district court proceedings.

[7]Unregistered shares are also referred to as "lettered" shares.

[8]Hagerman's supplemental memorandum regarding damages anticipated that Yukon would argue that the shares were to be unregistered, and therefore Hagerman argued to the contrary. However, in its supplemental memorandum, which was filed the same day as Hagerman's, Yukon did not raise the issue that the shares were to be unregistered.

Therefore, at the time it ruled on Hagerman's motion for summary judgment, the district court had before it only evidence of the fair market value of the shares Hagerman was to receive had they been registered. Yukon had failed to raise a genuine fact issue that the shares were to be unregistered. Therefore, the district court properly granted summary judgment for Hagerman with damages based on the value of registered shares.

The next question that arises, then, is whether the district court erred in failing to grant Yukon's motion to alter or amend judgment based on Yukon's new argument that the shares were to be unregistered. A district court has broad discretion in determining whether to grant a motion to alter or amend judgment, and this court will not reverse absent a clear abuse of discretion by the district court. *See Harris v. Arkansas Dept. of Human Serv.,* 771 F.2d 414, 416-17 (8th Cir. 1985). We find no such abuse of discretion in this case.

As the Seventh Circuit recently stated:

> "Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment .... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."

Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir.), *as amended,* 835 F.2d 710 (1987) (quoting *Keene Corp. v. International Fidelity Ins. Co.,* 561 F.Supp. 656, 665-66 (N.D. Ill. 1983), *aff'd,* 736 F.2d 388 (7th Cir. 1984). A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment. *Federal Deposit Ins. Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir. 1986). *See also, Whitlock v. Midwest Acceptance Corp.,* 575 F.2d 652, 653 n.1 (8th Cir. 1978) (holding that district court properly denied plaintiffs' motion for relief of judgment based on newly submitted affidavits which tended to prove plaintiffs' allegations where the information in the affidavits had been

available prior to entry of summary judgment and plaintiffs failed to explain why the affidavits were not submitted earlier).

In the present case, Yukon does not contend that it was unable to raise the issue of the registration of the shares prior to the entry of summary judgment.[9] Nor does it assert that it was unable to present the affidavits of Ellingboe and the securities experts prior to the time it filed its motion to alter or amend judgment. Therefore, the district court did not abuse its discretion in denying Yukon's motion to alter or amend judgment.

Yukon next argues that even if the shares were to be registered, it raised genuine fact issues as to the date of Yukon's breach of the stock provision and as to the book value to be assigned to Hagerman's shares. With regard to the date of the breach, Yukon argues that the breach occured on October 23, 1984, the date Hagerman notified Yukon of his intent to exercise the stock option. Yukon asserts that this affects Hagerman's damages, because the market price of Yukon stock on October 23, 1984, was approximately 50 cents a share. However, as the district court properly noted, the technology agreement provided that Hagerman's option was valid only in the event of a public offering of Yukon stock. The public offering occurred on March 28, 1985, at which time the fair market value of the stock was $2.00 per share. We agree that Yukon failed to raise a factual question as to the date of the breach.

Yukon also argues that it raised a fact question as to the book value of the stock. The prospectus simply provided that Yukon was to sell the shares to Hagerman at book value as determined by the accounting firm of Peat, Marwick & Mitchell. The agreement did not say which date was to be considered in determining book value. In finding a book value of $.23 per share, the district court relied on Yukon's statements in its prospectus in

[9]In its memorandum in support of its motion to alter or amend judgment, Yukon argued that it had not previously had the opportunity to address Hagerman's damages with regard to a March, 1985 date of breach, thereby impliedly arguing that it did not have the opportunity to argue whether the shares were to be registered. Yukon's position prior to its motion to alter or amend judgment had been that the breach occurred in October, 1984, before any of the shares were registered. However, at the summary judgment hearing, Hagerman argued that the breach occurred at the earliest on March 28, 1985, the first day Yukon stock was offered to the public. Additionally, the district court at the summary judgment hearing specifically asked Yukon's attorney whether Hagerman's shares were to be registered. Therefore, Yukon had ample opportunity to raise the issue of the registration of Hagerman's shares prior to the district court's entry of summary judgment.

which it stated that Hagerman had the option to purchase the shares "exercisable at the book value of the Company at the time of exercise." *See* note 4, *supra*. The prospectus continued that in October, 1984, Yukon stock had a book value of $.23 per share.

Yukon now argues that the book value of the shares ought to be determined as of the date of the breach. Yukon argues that the prospectus showed that as of the date of the breach, March 28, 1985, the book value of the stock was $.65 per share. However, a review of the prospectus shows that Yukon's argument is without merit. The figure asserted by Yukon to be the stock's book value as of March 28, 1985, is actually listed in the prospectus as the "pro forma net tangible book value after offering," figured as of September 30, 1984. This figure represents the amount of Yukon's total tangible assets less its total tangible liabilities, giving effect to issuance of 1,000,000 shares of Yukon stock at $2.50 per share, as of September 30, 1984. Thus, this figure does not accurately reflect the actual book value of the stock as of the date of the breach. Yukon failed to offer any other evidence as to the stock's book value. Therefore, the district court did not err in granting summary judgment on this issue.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Civil No. 4-85-960

William F. Hagerman

vs. Order

Yukon Energy Corp., et al.

George R. Serdar and Steven E. Antolak, BOWMAN & LONDON, LTD., St. Paul, Minnesota, for plaintiff.
Lawrence T. Hofmann, ROBINS, ZELLE, LARSON & KAPLAN, Minneapolis, Minnesota, for defendants.

In this action, plaintiff William Hagerman (Hagerman) contends defendants Yukon Energy Corporation (Yukon) and David Tjosvold (Tjosvold) breached a stock purchase option agreement allegedly entered into among the parties. Plaintiff is a Florida citizen, defendants are Minnesota citizens, and the amount in controversy exceeds $10,000. The jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. 1332.

The matter is before the Court on defendant Tjosvold's motion for summary judgment, and on plaintiff's cross-motion for summary judgment. A hearing was held on April 14, 1986. Based on the files, records, and proceedings herein, each motion is granted.

Facts

Defendant Yukon designs, manufactures and sells furnaces for residential and light commercial use. Defendant Tjosvold is Yukon's president. In the early 1983, for the sum of $100,000, Yukon purchased oil condensing furnace technology which permitted it to create a 95% efficient furnace.

To fund and develop this technology, Yukon entered into a technology agreement with Hagerman on November 17, 1983. Tjosvold signed the agreement on Yukon's behalf. The agreement provided that Hagerman was to purchase the oil con-

densing furnace technology from Yukon for $150,000. The $50,000 additional sum realized in this sale was to be used to complete development of the technology. Yukon retained, for 10 years, the right to repurchase the technology for $175,000, and the right to use the technology in the production and sale of its furnaces. Hagerman was to receive a ten dollar royalty for each furnace sold, subject to a guaranteed minimum annual payment of $18,000 and a maximum annual payment of $40,000.

Yukon, in the same agreement, granted Hagerman an irrevocable and exclusive option to purchase shares of Yukon's stock, should Yukon carry out a public stock offering. The number of shares Hagerman could purchase under the option was equal to five percent of the shares owned by Tjosvold, who at the time of the agreement was Yukon's sole shareholder. This stock purchase option was to be exercised in writing prior to commencement of any stock offering.

When, on October 23, 1984, Yukon repurchased the furnace technology from Hagerman for $175,000 and paid him $18,000 in royalties, Hagerman notified Yukon, in writing, of his intention to exercise the stock purchase option granted to him in the technology agreement. Although Yukon made a public stock offering in March, 1985, it has not transferred shares to Hagerman.

Hagerman instituted this action against defendants in August, 1985, alleging breach of contract and seeking either specific performance, damages or injuctive relief. Plaintiff has now brought this summary judgment motion on his breach of contract claim. Defendant Tjosvold's cross motion seeks a declaration that he is not liable to Hagerman because his signature on the November, 1983, stock option agreement was in his corporate, not personal, capacity.

Discussion

In analyzing this case, the court has clearly in mind the directive that a party is not entitled to summary judgment unless no genuine issue exists as to any material fact. Rule 56(c) of the Federal Rules of Civil Procedure. If the evidence is such that a reasonable jury could not return a verdict for the non-moving party, summary judgment is appropriate. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510, 2511 (1986). Although the

movant has the burden of showing there is no genuine issue of fact, the non-movant must set forth specific facts showing there is a genuine issue for trial; he may not rest upon the mere allegation or denials of his pleading. *Id.* at 2514. In considering a summary judgment motion, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 2513.

I. Defendant Tjosvold's motion for summary judgment

Defendant Tjosvold has moved for summary judgment claiming he is not liable under the technology agreement because he was not, personally, a party to that contract. Rather, he claims he entered into that agreement as president of Yukon on its behalf. Plaintiff, in his supplementary memorandum, admits that Tjosvold is not personally bound by the technology agreement nor is he obligated for any damages to which plaintiff may be entitled. In light of plaintiff's admissions, Tjosvold's motion for summary judgment is granted. Tjosvold is dismissed as a party.

II. Plaintiff's motion for summary judgment

A. Breach of Contract

Plaintiff contends he is entitled to summary judgment because Yukon breached the agreement in failng to honor his stock option. Yukon replies that subsequent to the agreement's execution, it was orally modified, voiding plaintiff's stock purchase option. Specifically, defendant states that after the technology agreement was executed, the personal relationship between plaintiff and Tjosvold deteriorated markedly. Defendant claims that in mid-1984, plaintiff, professing a lack of confidence in Tjosvold and Yukon, declared he no longer wished to be associated with Yukon and stated if the funds called for by the agreement were paid to him, he would terminate the agreement and each party could walk away from it. Defendant claims that by paying plaintiff the repurchase price for the technology and the royalties, the agreement, including the stock purchase option, was no longer in effect.

Minnesota law clearly allows the subsequent oral modification of a written contract not within the statute of frauds.[1] *New*

[1]The parties do not claim this contract is within the statute of frauds nor does it appear to be covered by the statute. See, J. Calamari & J. Perillo, *The Law of Contracts* 672, 673 (2d ed. 1977).

Amsterdam Casualty Co. v. Lundquist, 293 Minn. 274, 288 n.5, 198 N.W.2d 543, 551 n. 5 (1972); *Mitchell v. Rende,* 225 Minn. 145, 148, 30 N.W.2d 27, 30 (1947). Such modification requires no new consideration if it is made when the contract is still executory and there has been no breach, since the consideration from the original contract attaches to and supports the modified contract. *Mitchell,* 225 Minn. at 149, 30 N.W.2d at 30; *Asbestos Products v. Healy Mech. Contractors,* 306 Minn. 74, 76, 235 N.W.2d 807, 809 (1975). Although parties may expressly modify a contract without new consideration, it must be established that such an agreement was in fact made. See, *Cambern v. Hubbling,* 307 Minn. 168, 171, 238 N.W.2d 622, 624 (1976).

In this case, it is Yukon's word against plaintiff's that the contract at issue was orally modified. Plaintiff denies the modification. Such a factual dispute would normally preclude summary judgment. But the facts of this case bear further scrutiny. Here, all of defendant's actions subsequent to the alleged contract moidification (save and except only its breach thereof) indicate that the contract was not, in fact, modified.

Yukon's actions show its own belief in the validity of the stock option agreement. In conjunction with Yukon's public offering of stock, it submitted registration statements to the Minnesota Department of Commerce and the United States Securities and Exchange Commission. The company appended the technology agreement to both statements with no indication of any kind that the stock purchase option had lapsed, was void, or was otherwise disputed by the parties.

In addition, the prospectus dated February 14, 1985, describing Yukon's offering, is replete with references to plaintiff's stock purchase option. There is no repudiation or qualification stated. For example, on page 10 of the prospectus, Yukon indicates how the technology for its furnaces was funded, specifically describing the technology agreement:

> The Company financed the purchase of such technology through the assignment of all of its interest in the technology to an unrelated individual in exchange for $150,000. In conjunctin with such assignment, the Company received an irrevocable, exclusive 10-year license for use of the technology and a concurrent 10-year option to repurchase the technology for $175,000 and granted to

such individual an option to purchase a number of shares equal to 5% of the number of shares of Common Stock of the Company held by David C. Tjosvold immediately prior to any public offering of the Common Stock of the Company, exercisable at the book value of the Company at the time of exercise. *In October 1984, the Company exercised its option to repurchase the technology and the individual notified the Company of his intent to exercise his purchase option. Accordingly, the company will issue up to 164,021 shares of its Common Stock to such individual at approximately $.23 per share upon receipt of payment therefore.* (Emphasis added.)

At pages 30 and 31 of the prospectus, the above passage is essentially repeated. In addition, pages 3 and 4 of the prospectus reference the stock option held by plaintiff.

Yukon's assertion that the technology agreement has been modified is inconsistent with the information contained in its prospectus filed with federal and state securities regulation agencies. Both the Federal Securities Act of 1933, 15 U.S.C. 77j, *et seq.*, and the Minnesota Uniform Securities Act, Minn. Stat. 80A.17, *et seq.*, prohibit false statements in prospectus accompanying securities registration statements and provide for penalties if such statements are included.

The Court holds that Yukon, having averred the existence of Mr. Hagerman's option while obtaining the benefits of the securities laws, is estopped from denying the truth of its own statements. Securities registration documents are prepared so that the public may rely on the company's veracity. The company has obtained the advantages which flow from that reliance. Yukon will not now be heard to claim a second advantage by asserting that its own statement is a lie.

The statements, filed by Yukon on its own behalf, must be taken as true. Therefore, based upon defendant's own assertions, the Court finds that the technology agreement has not been orally modified. Yukon has breached the technology agreement by failing to honor plaintiff's stock purchase option. Summary judgment is granted.

B. Damages

In granting summary judgment, the Court must determine

the monetary damages adequate to compensate plaintiff for Yukon's breach. The appropriate measure of recovery will place plaintiff in the position he would have occupied absent the breach. *Desnick v. Mast*, 311 Minn. 356, 364, 249 N.W.2d 878, 883 (1976). The parties agree that this amount is to be measured by the difference between the contract price for the stock at issue and its fair market value. (See, Defendants' Memorandum, at 2, and Plaintiff's Memorandum, at 7 and 8.) The parties do not agree, however, as to the numbers associated with those values.

Despite the parties' disagreement, the technology agreement itself sets the contract price for the stock. Plaintiff was authorized to purchase 5% of the shares owned by Tjosvold; the cost of those shares was book value as determined by the accounting firm of Peat, Marwick & Mitchell. (See, Paragraph 9, technology agreement). On page 10 of Yukon's prospectus dated February 14, 1985, (quoted above), filed in conjunction with its public offering of stock, it is indicated that five percent of the shares owned by David Tjosvold equals 164,021 shares. Book value of those shares is approximately 23 cents. Therefore the contract price for the shares available to plaintiff is 164,021 x $.23 = $37,725.

Yukon contends the fair market value of its stock should be assessed as of the date it breached the stock purchase option agreement. Defendant contends the breach occurred on October 23, 1984, the date plaintiff notified Yukon of his intention to exercise the stock purchase option. Yukon has valued its stock as of that date at no more that 50 cents per share.

The Court does not accept Yukon's assessment. Plaintiff notified Yukon of his intention to exercise his stock purchase option on October 23, 1984. Yukon was not obligated to sell its stock until its public offering. This occurred on March 28, 1985. Therefore, the Court finds that Yukon's breach occurred on March 28, 1985, when it declined to issue its shares to the plaintiff. The fair market value of Yukon's stock must be valued as of that date.

On March 28, 1985, the market absorbed Yukon's stock at $2.00 per share. The fair market value of the stock option is 164,021 x $2.00 = $328,042. Subtracting from that sum the contract price of the stock option yields the damages for defen-

dant's breach of contract. That is, $328,042 - $37,725 = $290,317.[2]

Plaintiff suggests the fair market value of the stock should be the $4.00 per share price attained on July 11, 1985 (its highest market price). He argues that valuing the stock in this manner gives him the benefit of any profit lost as a result of defendant's breach. The Court rejects this suggestion.

According to Minnesota law, "damages in the form of lost profits may be recovered where they are shown to be the natural and probable consequences of the act or omission complained of and their amount is shown with a reasonable degree of certainty and exactness." *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W.2d 260, 266 (Minn. 1980); *Edling v. Stanford TP.*, 381 N.W.2d 881, 884 (Minn. App. 1986). The controlling principle is that speculative, remote or conjectural damages are not recoverable. *Cardinal*, 297 N.W.2d at 267.

The Court concludes that the measure of damages cannot be assessed taking into account plaintiff's lost profits. To award plaintiff recovery for lost profits would necessarily presuppose that plaintiff had accurately guessed the precise date and instant Yukon's shares would reach their market high. The Court would then have to conclude that plaintiff would have sold the stock on that date, and that the market could have instantly absorbed his 164,021 shares. This the Court cannot do. The fair market value of the stock will be assessed as of March 28, 1985, when Yukon was obligated to transfer its stock to plaintiff.

C. Attorneys Fees

Plaintiff seeks to recover attorney's fees as a result of instituting this action. In general, "attorney's fees are not recoverable in litigation unless there is a specific contract permitting it [sic] or a statute authorizing such recovery." *Jacobs v. Rosemount Dodge-Winnebago South*, 310 N.W.2d 71, 79 (Minn. 1981). In this case, the technology agreement makes no provision for the recovery of attorney's fees nor is there a statute providing for such recovery. Attorney's fees will not be awarded to plaintiff.

---

[2]Pursuant to Minn. Stat. 549.09, plaintiff is entitled to interest on this sum as computed by the Clerk of Court in accordance with Minn. Stat. 549.09, subd. 1(c) from the time of commencement of the action until judgment is entered.

For the reasons set forth above, IT IS ORDERED that:

1. Defendant David Tjosvold's motion for summary judgment is granted. David Tjosvold is dismissed as a party.

2. Plaintiff's motion for summary judgment is granted. Defendant Yukon Energy Corporation must pay plaintiff $290,317.00, plus interest in accordance with Minnesota Statute 549.09.

3. Plaintiff's request for attorney's fees is denied.

4. Judgment having been entered on the plaintiff's behalf, he is awarded his costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 21st, 1986

/s/ James M. Rosenbaum

JAMES M. ROSENBAUM
United States District Judge

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy; and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is compe-

tent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

AGREEMENT

WHEREAS, Yukon Energy Corporation (Yukon) of 9890 Highway 65, Blaine, Minnesota, is a Minnesota corporation manufacturing and selling residential and commercial furnaces, and

WHEREAS, YUKON entered into an agreement dated August 19, 1983, with the Wayne Home Equipment Division of Scott & Fetzer Company, Fort Wayne, Indiana, concerning an option to purchase certain oil fired and gas fired condencing mode furnace technology (hereinafter the TECHNOLOGY), and

WHEREAS, YUKON is conducting research and development presently on the TECHNOLOGY and is investigating the patent rights, if any, which may be available upon the TECHNOLOGY, and

WHEREAS, William F. Hagerman (hereinafter HAGERMAN) of 9651 Naples St., N.E., Blaine, Minnesota, is an individual who desires to invest in the TECHNOLOGY, and

WHEREAS, YUKON desires to manufacture and market furnaces using the TECHNOLOGY, and

WHEREAS, the parties know and understand that the purchase and development of the TECHNOLOGY is a speculative venture and that the investor's money is at risk,

NOW THEREFORE the parties agree:

1. That for the purpose of this agreement HAGEMAN shall have the right to form a corporation to carry out the agreement in his place provided that HAGERMAN shall give timely notice to YUKON of his choice to form such a corporation; that the corporation shall be in good standing in the state in which it is formed; and that the corporation shall be expressly bound to, and shall be authorized to, carry out the rights and duties of HAGERMAN under this agreement.

All references to HAGERMAN hereafter include any corporation formed under this paragraph.

2. That in consideration of their mutual covenants, and the payment of One Hundred Fifty Thousand and no/100 ($150,000.00) Dollars by HAGERMAN to YUKON, receipt of which is acknowledged, YUKON assigns to HAGERMAN all of its right, title and interest to the TECHNOLOGY, the prototype

furnaces using that TECHNOLOGY, the warranties, and the patent rights, if any, arising under the option agreement of August 19, 1983.

3. That YUKON expressly retains the right to make its own good faith determination whether to exercise its option on or before the date of December 1, 1983. If YUKON determines not to exercise the option it shall promptly notify HAGERMAN. This agreement shall then become void and both parties shall be restored, to the extent possible, to their position prior to the execution of this agreement.

4. That between these parties HAGERMAN shall bear the cost and expense of research and development of the TECHNOLOGY not to exceed Fifty Thousand and no/100 ($50,000.00) Dollars.

5. That HAGERMAN grants to YUKON for 10 years the exclusive license to United States patents, if any, arising in connection with that TECHNOLOGY; to make, use and sell furnaces using the patents and TECHNOLOGY; and to license or assign its rights as licensee to others throughout the World.

6. That for a period of 10 years from the date of this agreement YUKON shall pay to HAGERMAN a royalty of Ten and no/100 ($10.00) Dollars upon each furnace sold by it or its licensees using the TECHNOLOGY. The royalties in any calendar year shall not be less than Eighteen Thousand and no/100 ($18,000.00) Dollars nor greater than Forty Thousand and no/100 ($40,000.00) Dollars regardless of the number of furnaces sold, and in the event that YUKON exercises its option herein to purchase the TECHNOLOGY all such royalty payments shall cease.

7. That for a period of 10 years HAGERMAN grants to YUKON an exclusive and irrevocable option to buy all of HAGERMAN's right, title and interest in the TECHNOLOGY for the sum of One Hundred Seventy-five Thousand and no/100 (175,000.00) Dollars. The option shall be exercised, if at all, in writing with the terms of payment to be determined by the parties in good faith.

8. That in the event that David C. Tjosvold, President of Yukon Energy Corporation, shall die during the 10-year option period that event shall be deemed an exercise of the option by YUKON to purchase the TECHNOLOGY the agreed price of One Hundred Seventy-five Thousand and no/100 ($175,000.00) Dollars payable to HAGERMAN.

9. That in the event that YUKON shall decide to carry out a public stock offering within 10 years of this agreement, then YUKON grants to HAGERMAN an irrevocable and exclusive option to purchase shares of Yukon equal to 5% of the share owned by David C. Tjosvold, President, at book value as determined by the accounting firm of Peat, Marwick & Mitchell.

This option must be exercised, if at all, in writing and prior to the commencement of any such public stock offering. If the public stock offering fails or is abandoned then YUKON shall promptly notify HAGERMAN in writing. Within 30 days of such notice to HAGERMAN, HAGERMAN shall sell and YUKON shall buy back all of such shares at the same price.

10. Except as otherwise herein provided, this agreement shall be binding upon the parties, their successors, heirs, devisees, legal representatives, executors and assigns.

11. All questions with respect to the construction of this agreement and the rights and liabilities of the parties shall be determined in accordance with Minnesota law.

12. Any controversy arising under or out of this agreement and any amendments hereto, shall be determined by arbitration in Minneapolis, in connection with the Rules of the American Arbitration Association.

Dated: _____, 1983.

YUKON ENERGY CORPORATION
By */s/ David C. Tjosvold*
Its *President*

/s/ William F. Hagerman
William F. Hagerman